No. 96-1517

(4)

Supreme Court, U.S.
FILED
APR 24 1997
OFFICE OF THE CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1996

DAVID FIDEL; MARIT FIDEL; ERIK FIDEL; AND HILDA FIDEL,
Petitioners,

VS.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA; LEXINGTON INSURANCE COMPANY; AMERICAN INTERNATIONAL GROUP; PARKER, COULTER, DALEY & WHITE; CLEMENS, GLASSMAN & CLEMENS; STULL, STULL & BRODY; GIBSON, DUNN & CRUTCHER; HERBERT J. YOUNG; JOHN R. WILLIAMSON; MELVIN SPITZ; BERNICE HUTTER; RAFAEL E. VEGA; HOUSTON I. FLOURNOY and ROBERT R. SPRAGUE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the Ninth Circuit Court of Appeals correctly hold in this diversity action that petitioners' state law claims alleging, *inter alia*, misrepresentation and fraud in connection with the earlier settlement of a federal securities class action, were barred by the applicable state statutes of limitations?[1]

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[1] Neither Petitioners' second nor third "Questions Presented" raise issues pertaining to respondents Gibson, Dunn & Crutcher LLP ("GDC"), Herbert J. Young, John R. Williamson, Melvin P. Spitz, Bernice H. Hutter, Rafael E. Vega, Houston I. Flournoy or Robert R. Sprague (the "Officer/Director Respondents"). Accordingly, GDC and the Officer/Director Respondents will not discuss those purported issues in this Brief in Opposition to the Petition. Respondents note, however, that the scope of the "litigation privilege" of California Civil Code section 47(b) is purely a matter of state law and therefore is not appropriate for review by this Court.

RULE 29.6 STATEMENT

Respondent Gibson, Dunn & Crutcher LLP is a California limited liability partnership that has no parent companies, subsidiaries or affiliates.

Respondents Herbert J. Young, John R. Williamson, Melvin P. Spitz, Bernice H. Hutter, Rafael E. Vega, Houston I. Flournoy and Robert R. Sprague have no parent companies, subsidiaries or affiliates.

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Respondents Gibson, Dunn & Crutcher LLP, Herbert J. Young, John R. Williamson, Melvin P. Spitz, Bernice H. Hutter, Rafael E. Vega, Houston I. Flournoy and Robert R. Sprague respectfully submit this opposition to petitioners David Fidel, Marit Fidel, Erik Fidel and Hilda Fidel's (the "Fidels") Petition for Writ of Certiorari.

STATUTORY PROVISIONS INVOLVED

California Code of Civil Procedure § 337

> "Within four years: 1. An action upon any contract, obligation or liability founded upon an instrument in writing . . . .

California Code of Civil Procedure § 338(d)

> "Within three years:
>
> . . .
>
> (d) An action for relief on the ground of fraud or mistake. The cause of action in that case is not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

California Code of Civil Procedure § 339

> "Within two years: 1. An action upon a contract, obligation or liability not founded upon an instrument of writing . . . ."

California Code of Civil Procedure § 340.6

> "(a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. . . ."

COUNTERSTATEMENT OF THE CASE

A. Introduction

There is no basis or reason for this Court to reconsider the state law matters decided by the Ninth Circuit Court of Appeals in this case.

In an unpublished memorandum decision, the Ninth Circuit held in this diversity action that, under state law principles of inquiry notice, the Fidels — five members of a plaintiff shareholder class in an underlying federal securities class action — were time-barred from pursuing state law fraud and misrepresentation claims arising out of the settlement of the class action. The Ninth Circuit found that the Fidels had inquiry notice of their state law fraud claims no later than September 1989, more than four years before the December 1993 filing of this action.

In affirming the district court's dismissal of the complaint based on California's statute of limitations, the Ninth Circuit properly applied California common law principles of inquiry notice to the Fidels' state law claims. The Ninth Circuit's decision reaffirms the unremarkable state law principle that plaintiffs who have notice of facts or circumstances that would put a reasonable person on inquiry, or who had the opportunity to obtain such information from available sources open to their investigation, must file their claims within the applicable period of limitations. Because the Ninth Circuit's decision addressed purely state law issues and merely ruled that the district court correctly determined, on the basis of the factual record before it, that the Fidels had inquiry notice, this case does not warrant review by this Court. *See Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983) ("a challenge to state-law determinations by the court of appeals will rarely constitute an appropriate subject of this Court's review.").

Apparently recognizing that a direct attack on the state law grounds for the Ninth Circuit's decision would provide no basis for review in this Court, the Fidels attempt to "federalize" those state law grounds by contending that the Ninth Circuit's decision undermines the purpose, objectives and procedures of Rule 23 of the Federal Rules of Civil Procedure. The Fidels' argument ignores, however, the procedural posture of this action. The constitutional adequacy of the Rule 23 notice of settlement was not at issue in this case, and neither the district court nor the court of appeals based their decisions on due process considerations. Indeed, the Fidels failed to raise due process arguments in the district court in this action, and therefore waived them. Instead of directly challenging the preclusive effect of the settlement and final judgment in the underlying class action by bringing a Rule 60(b) motion for relief, the Fidels elected to assert in this separate action forty-seven state law causes of action for damages against all of the participants in the class action settlement. Having chosen to forego a direct due process challenge to the settlement in the underlying action, the Fidels cannot in this diversity action contend that the district court erroneously approved the class action settlement.

B. Statement of Facts

Petitioners David, Marit, Erik and Hilda Fidel were purchasers of common stock and debt securities of Gibraltar Financial Corporation ("GFC"). By virtue of their purchases of GFC common stock, the Fidels became class members in a Rule 10b-5 securities class action filed in 1987 in the Central District of California, known as *In re Gibraltar Financial Corporation Securities Litigation*, No. CV-87-07976 MRP ("*In re Gibraltar*"). The complaint in *In re Gibraltar* alleged that GFC and its officers and directors disseminated false and misleading statements about Gibraltar's financial condition. Appendix A to Petition at 2.

In 1989, *In re Gibraltar* was settled for $8.5 million. By separate agreement, GFC's two directors and officers liability insurance carriers, respondents National Union Fire Insurance Company ("National Union") and Lexington Insurance Company ("Lexington"), agreed to fund the entire $8.5 million settlement. In return, GFC agreed to surrender the National Union policy and also agreed that any future claims against the officers and directors would be made solely under the Lexington policy. *Id.* at 3-4.

On June 23, 1989, the district court entered an order certifying the settlement class, approving the form of the notice of settlement,[2] directing plaintiffs' class counsel to mail the notice to members of the plaintiff class, and giving prospective class members until August 10, 1989 to "opt out" of the settlement. The district court also scheduled a hearing for September 11, 1989 to determine the fairness of the settlement, to consider final approval of its terms, and to entertain any objections to the proposed settlement. *Id.* at 2-3.

On September 11, 1989, the district court held its hearing regarding the proposed settlement. The Federal Deposit Insurance Corporation ("FDIC"), acting on behalf of GFC's Gibraltar Savings subsidiary, filed a written objection to the proposed settlement, attaching copies of the two "Settlement Implementing Agreements" between GFC and the carriers to its objection.[3] The FDIC's objections, and the facts surrounding GFC's agreements with the two insurance carriers, were the only substantive matters discussed at the

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[2] *See* Appendix C to Petition.

[3] GFC also included the Settlement Implementing Agreements in its regular filings with the Securities and Exchange Commission, attaching copies as exhibits to its Form 8-K Report filed on July 17, 1989, and listing the agreements in its 1989 Form 10-K Report. Appendix A to Petition at 11.

hearing. The district court, after hearing argument by the FDIC, approved the settlement, and on September 19, 1989 entered a Final Judgment dismissing *In re Gibraltar*. The Final Judgment provided that (i) the settlement was fair, reasonable and adequate; (ii) the notice of settlement constituted sufficient notice to the class members under FRCP 23; (iii) the claims asserted by the class plaintiffs were dismissed with prejudice; and (iv) any member of the settlement class not opting out of the settlement would be bound by it and would be barred from prosecuting the released claims. *Id.* at 4-5.

The Fidels, as did all other members of the plaintiff class who did *not* opt out, executed proof of claim forms which, among other things, released all claims against GFC, its officers, directors and "agents, attorneys, and representatives." The Fidels received approximately $250,000 in the settlement. *Id.* at 5-6.

On December 14, 1993, more than four years after the district court approved the settlement and entered its Final Judgment in *In re Gibraltar*, the Fidels brought this action, alleging forty-seven state law claims, including fraud, negligent misrepresentation, breach of fiduciary duty and attorney malpractice against (a) National Union, Lexington and their counsel, (b) the two law firms representing the plaintiff settlement class, Clemens, Glassman & Clemens and Stull, Stull & Brody, (c) the defendant officers and directors in the underlying *In re Gibraltar* class action, and (d) their defense counsel, Gibson Dunn & Crutcher.[4] *Id.* at 6-7, 10. The Fidels alleged that the defendants had failed to disclose

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[4]Petitioners incorrectly suggest that they asserted federal claims in this case. *See* Petition at 20. To the contrary, the Fidels asserted purely state law causes of action in their complaint and based federal court jurisdiction for their state law claims on diversity grounds. *See* Petition at 2 ("The primary basis for jurisdiction in the District Court was under 28 U.S.C. § 1332(a)."); Appendix A to Petition at 10 n.8.

in the *In re Gibraltar* notice of settlement (1) that additional insurance was available to pay the claims of the settlement class, and (2) that GFC and its insurance carriers had agreed to cancel the National Union policy and to require Lexington to assume responsibility for claims asserted in another pending lawsuit against the GFC officers and directors. *Id.* The Fidels allege that they participated in the settlement solely because of the purported misleading statements in the notice of settlement, and contend that had they known of the full amount of available insurance coverage, they would have opted out of the settlement and filed their own lawsuit to recover their losses in GFC's securities.

The district court granted each of the defendants' motions to dismiss, stating that the dismissal was based, in part, on the Fidels' failure to commence this action within the applicable state law periods of limitations. *See* Appendix B to Petition. The Ninth Circuit affirmed on this ground, holding that, as to all claims except those against class counsel, the Fidels were on inquiry notice of their claims, sufficient to trigger the running of the statute of limitations, as of the date of the district court's September 11, 1989 settlement hearing.[5] Appendix A to Petition at 10. The Ninth Circuit based its ruling on its finding that all of the facts that were allegedly misrepresented or concealed by the defendants (a) had been fully disclosed to the district court in *In re Gibraltar* by September 11, 1989, both orally and in

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[5]The Ninth Circuit also held that plaintiff Bernard Fidel (not a petitioner here) was on *actual* notice of his claims against plaintiffs' class counsel more than one year before he asserted them, and therefore that those claims were time-barred under the California statute of limitations applicable to causes of action for attorney malpractice. Appendix A to Petition at 13. As to the remaining petitioners, the Ninth Circuit found that a factual question exists as to when they received actual notice of their claims against class counsel, but that those claims are barred in any event by the litigation privilege set forth in California Civil Code section 47(b). *Id.* at 14-16.

a memorandum filed by the FDIC,[6] (b) had previously been included by GFC in its public filings with the Securities and Exchange Commission, and (c) were alluded to in the settlement notice approved by the district court and sent to the Fidels, which specifically invited class members to inspect the complete settlement documents and other pleadings and papers on file in the district court clerk's office. *Id.* at 10-11.

REASONS FOR DENYING THE FIDELS' PETITION

The Petition raises no issues worthy of this Court's consideration. The Ninth Circuit's unpublished decision neither decided any federal questions nor conflicts with any decision of another circuit. Rather, this is a purely state law case, filed pursuant to the district court's diversity jurisdiction and decided by applying settled principles of state law to the facts alleged in the Fidels' complaint. There is therefore no basis for review by this Court. *See Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983).

The Fidels' primary argument — that the Ninth Circuit's decision "establishes a new and different standard" for Rule 23 proceedings, and therefore that a substantial and important federal question is raised by this Petition — fails, for several reasons, to justify review by this Court.

First, as noted above, the Ninth Circuit's decision rested solely on state law inquiry notice principles applied to determine when the California statute of limitations commenced to run with respect to the Fidels' state law claims. Neither the district court nor the Ninth Circuit purported to decide whether or not the *In re Gibraltar* notice of settlement complied with Rule 23 due process requirements. Instead, the courts' decisions simply held that certain state-

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[6]The Fidels admit that the district court had all relevant facts before it by the time of the settlement approval hearing. *See* Petition at 19.

ments contained in the notice, when combined with other information available to the Fidels in the district court's files and in other public records, were sufficient to put the Fidels on inquiry notice of their later filed state law claims.[7] The Ninth Circuit's unpublished decision, therefore, does not, contrary to the Fidels' contention, set any precedent for future Rule 23 cases.

The mere fact that the district court and the Ninth Circuit based their findings that inquiry notice was triggered, in part, by the Fidels' receipt of the Rule 23 notice of settlement does not create a federal question concerning the adequacy of the settlement notice under the due process requirements of Rule 23. Nor does the fact that the Fidels allege in this Court that the underlying Rule 23 notice was constitutionally inadequate create a federal question in this state law fraud and misrepresentation case. *See Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983) (a claim based on state law falls within the federal question jurisdiction of the federal courts *only* if "federal law creates the cause of action, or . . . plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law."); *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) ("A suit arises under the law that creates the cause of action.").

Second, the Fidels did not raise in the district court any issue with respect to the due process requirements of Rule 23, or in particular the question of the adequacy of the notice of settlement in *In re Gibraltar*. Accordingly, the Fidels have waived that argument, and may not raise it here. *United States v. Alvarez-Sanchez*, 511 U.S. 350, 114 S. Ct.

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[7]The Fidels do not even discuss the Ninth Circuit's application of California principles of inquiry notice, let alone contend that the circuit's decision erroneously applied those principles to the facts of this case. *See* Petition at 17-22; Appendix A at 9-11.

1599, 1605 n.5 (1994); *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 195 n.2. (1989).

Third, even absent this waiver, this is not the proper forum in which to complain that the notice of settlement was inadequate. The Fidels' due process argument should have been made, if at all, in the *In re Gibraltar* case itself either as on objection to the proposed settlement or by way of a later motion, pursuant to Rule 60(b), to set aside the settlement and resulting final judgment. Having decided long ago not to pursue these potential avenues for relief, the Fidels may not litigate the adequacy of the *In re Gibraltar* settlement notice for the first time in this Court by way of an appeal from the dismissal of wholly independent state law claims for money damages asserted against all of the participants in that settlement.[8]

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[8] *See Valerio v. Boise Cascade Corp.*, 80 F.R.D. 626, 658 (N.D. Cal. 1978), *aff'd*, 645 F.2d 699 (9th Cir.), *cert. denied*, 454 U.S. 1126 (1981) ("In substance, if not in form, the gravamen of plaintiffs' lawsuit is that the [class action] settlement was inadequate. There perhaps are many who, with the benefit of hindsight, might well agree with that position. In 1973, however, we were satisfied not only with the adequacy of the representation and notice given the class but also with the adequacy of the settlement. The plaintiffs could have challenged our conclusion in the Ninth Circuit Court of Appeal. They chose not to do so. They cannot now relitigate that issue behind a rhetorical smoke-screen of fraud and conspiracy.")

CONCLUSION

The fact-bound determination by the district court and the Ninth Circuit that the Fidels were on inquiry notice of their state law claims under the circumstances alleged in the complaint is not appropriate for this Court's review. Accordingly, the Fidels' Petition for Writ of Certiorari should be denied.

Dated: April 24, 1997

Respectfully submitted,

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